

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of: Vivian A. Schramm et al. § Group Art Unit: 1761
Serial No.: 09/707,156 § Examiner: Kelly Jo Bekker
Filed: November 06, 2000 § Docket: MRS-015U
For: Spill-Proof Candy Container § Conf No.: 8663

APPEAL BRIEF

Commissioner of Patents
Alexandria, VA 22313-1450

This correspondence is being
electronically transmitted to the
patent office via an EFS-Web
transmission on Sep 4, 2012.

Dear Sir:

Pursuant to 37 CFR § 41.37, appellants submit this Appeal Brief to the Board of Patent Appeals and Interferences in support of their appeal from the decision dated April 2, 2012 of the examiner rejecting claims 27-46 of the captioned application. Appellants submit herewith the requisite fee for the filing of a brief in support of an appeal pursuant to 37 CFR § 41.20(b)(2) via the EFS-Web transmission. Appellants submit that the Examiner erred in rejecting the claims, and respectfully request reversal of the rejection.

(c)(1)(i) Real Party in Interest

The real party in interest is Vivian A. Schramm and Michael R. Schramm.

(c)(1)(ii) Related Appeals and Interferences

Appellants are unaware of any pending appeal or interference which affects this appeal.

(c)(1)(iii) Status of Claims

Claims 27-46 are rejected and are pending and on appeal.

(c)(1)(iv) Status of Amendments

The appealed claims have been finally rejected. No amendments have been filed subsequent to the latest final rejection.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 27

The subject matter of claim 27 is “A container for use in coating a lollipop with a candy powder while preventing spillage of the candy powder, wherein the container includes an inner cavity and a funnel extending into the inner cavity, and wherein the container removably contains at least one of an edible particulate substance and a candy substance” as described in the specification on page 6, first paragraph through page 7, fourth paragraph, page 12, first paragraph, and the drawings figures 1 through 3.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 34

The subject matter of claim 34 is “A container for use in coating a lollipop with a candy powder while preventing spillage of the candy powder, wherein the container includes an inner cavity and an open opening, and wherein the container contains an edible particulate substance within the container, and wherein the container inhibits the spillage of the edible particulate substance when the container is oriented in any orientation” as described in the specification on page 6, first paragraph through page 7, fourth paragraph, page 12, first paragraph, and the drawings figures 1 through 3.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 41

The subject matter of claim 41 is “A container for use in coating a lollipop with a candy powder while preventing spillage of the candy powder, wherein the container includes an inner cavity

and a funnel extending into the inner cavity, and a contents access utensil removably positioned in the container” as described in the specification on page 6, first paragraph through page 7, fourth paragraph, page 12, first paragraph, and the drawings figures 1 through 3.

(c)(1)(vi) Grounds of Rejection to be Reviewed on Appeal

Ground 1: Claims 27-46 are rejected under 35 USC § 103(a) as being unpatentable over the Product Alert (3/23/98) reference as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A, B, D, F, and G, Baker (WO 00/19803), Coleman ('884), Hoeting et al ('870) and appellants' admission of the prior art, in view of Price (3,840,678), as further evidenced by Hunter (GB '356), Williams ('174), Ciffo (2,917,766), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al (GB '581), .McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (Fr '917), Pilot Ink (JP '388), and McCaffery ('164), and further in view of Vogelsang (4,522,523) and Manzone (4,522,523).

Ground 2: Claims 27-46 are rejected under 35 USC § 103(a) as being unpatentable over Price (3,840,678), as further evidenced by Hunter (GB '356), Williams ('174), Ciffo (2,917,766), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al (GB '581), .McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (Fr '917), Pilot Ink (JP '388), and McCaffery ('164), in view of Product Alert (3/23/98), as further evidenced by as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A, B, D, F, and G, Baker (WO 00/19803), Coleman ('884), Hoeting et al ('870) and appellants' admission of the prior art, and further in view of Vogelsang (4,522,523) and Manzone (4,522,523).

(c)(1)(vii) Argument 1, Claims 27-46 were erroneously rejected under 35 USC § 103(a) - Obviousness:

The examiner rejected claims 27-46 under 35 USC § 103(a) as being unpatentable over the Product Alert (3/23/98) reference as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A, B, D, F, and G, Baker (WO 00/19803), Coleman ('884), Hoeting et al ('870) and appellants' admission of the prior art, in view of Price (3,840,678), as further evidenced by Hunter (GB '356), Williams ('174), Ciffo (2,917,766), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al (GB '581), .McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (Fr '917), Pilot Ink (JP '388), and

McCaffery ('164), and further in view of Vogelsang (4,522,523) and Manzone (4,522,523). Appellants traversed the examiner's rejection and represents that all of claims 27-46 are nonobvious in light of and define over the cited references.

In the first instance, appellants respectfully point out that the instant application claims priority back to Schramm patent 5,246,046 ('046) having a filing date of January 30, 1992, and incorporates the same by reference (see the amendment to the specification filed October 25, 2011). Accordingly, '046 is not properly citable as prior art, and thus the examiner's rejection which cites '046 is improper. Inasmuch as the rejection is improper due to citing art that is not prior art, appellants respectfully request that the honorable board reverse the examiner's rejection.

In the second instance, appellants respectfully submit that all of the "cited art" is nonanalogous art. Appellants respectfully points out that all of appellant's claims are, "*for use in coating a lollipop with a candy powder while preventing spillage of said candy powder*" (see the preamble in each independent claim, namely claims 27, 34, and 41, of the instant application) and as such define a field of endeavor and problem to be solved that is substantially different than all of the "cited art". In substantiation of appellant's urging of nonanalogousness, appellants point to *In Re Klein* (see *In re Klein, No. 10-1411, 2011 WL 2178134 (Fed. Cir. June 6, 2011)*). Klein invented "*A convenience nectar mixing device for use in preparation of sugar-water nectar for feeding hummingbirds, orioles or butterflies*" which comprised a mixing container having a movable divider. The three references cited against Klein, namely, Roberts, O'Connor and Kirkman, were directed toward containers with movable dividers used to separate solid items. The CAFC reversed the BPAI in declaring Roberts, O'Connor and Kirkman to be nonanalogous art. Appellants posit that it was expressly Klein's specific statement of intended use in Klein's claim preamble – "*preparation of sugar-water nectar for feeding hummingbirds, orioles or butterflies*" – that caused the CAFC to reverse the BPAI. Likewise, appellants urge that appellant's statements of intended use in appellant's preambles have defined applicant's field of endeavor and problem to be solved and have clearly established the "cited art" to be nonanalogous. Accordingly, appellants respectfully request that the honorable board reverse the examiner's rejection.

In summary, inasmuch as all of claims 27-46 define over and are nonobvious in light of the cited references, inasmuch as the examiner's rejection is improper for relying on art that is not available as prior art, and inasmuch as all of the cited is nonanalogous, appellants respectfully request that the honorable board reverse the examiner's rejection.

(c)(1)(vii) Argument 2, Claims 27-46 were erroneously rejected under 35 USC § 103(a) - Obviousness:

The examiner rejected claims 1-14 and 21-26 under 35 USC § 103(a) as being unpatentable over Price (3,840,678), as further evidenced by Hunter (GB '356), Williams ('174), Ciffo (2,917,766), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al (GB '581), .McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (Fr '917), Pilot Ink (JP '388), and McCaffery ('164), in view of Product Alert (3/23/98), as further evidenced by as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A, B, D, F, and G, Baker (WO 00/19803), Coleman ('884), Hoeting et al ('870) and appellants' admission of the prior art, and further in view of Vogelsang (4,522,523) and Manzone (4,522,523). Appellants traversed the examiner's rejection and represents that all of claims 27-46 are nonobvious in light of and define over the cited references.

In the first instance, appellants respectfully point out that the instant application claims priority back to Schramm patent 5,246,046 ('046) having a filing date of January 30, 1992, and incorporates the same by reference (see the amendment to the specification filed October 25, 2011). Accordingly, '046 is not properly citable as prior art, and thus the examiner's rejection which cites '046 is improper. Inasmuch as the rejection is improper due to citing art that is not prior art, appellants respectfully request that the honorable board reverse the examiner's rejection.

In the second instance, appellants respectfully submit that all of the "cited art" is nonanalogous art. Appellants respectfully points out that all of appellant's claims are, "*for use in coating a lollipop with a candy powder while preventing spillage of said candy powder*" (see the preamble in each independent claim, namely claims 27, 34, and 41, of the instant application) and as such define a field of endeavor and problem to be solved that is substantially different than all of the "cited art". In

substantiation of appellant's urging of nonanalogousness, appellants point to In Re Klein (see In re Klein, No. 10-1411, 2011 WL 2178134 (Fed. Cir. June 6, 2011)). Klein invented "*A convenience nectar mixing device for use in preparation of sugar-water nectar for feeding hummingbirds, orioles or butterflies*" which comprised a mixing container having a movable divider. The three references cited against Klein, namely, Roberts, O'Connor and Kirkman, were directed toward containers with movable dividers used to separate solid items. The CAFC reversed the BPAI in declaring Roberts, O'Connor and Kirkman to be nonanalogous art. Appellants posit that it was expressly Klein's specific statement of intended use in Klein's claim preamble – "*preparation of sugar-water nectar for feeding hummingbirds, orioles or butterflies*" – that caused the CAFC to reverse the BPAI. Likewise, appellants urge that appellant's statements of intended use in appellant's preambles have defined applicant's field of endeavor and problem to be solved and have clearly established the "cited art" to be nonanalogous. Accordingly, appellants respectfully request that the honorable board reverse the examiner's rejection.

In summary, inasmuch as all of claims 27-46 define over and are nonobvious in light of the cited references, inasmuch as the examiner's rejection is improper for relying on art that is not available as prior art, and inasmuch as all of the cited is nonanalogous, appellants respectfully request that the honorable board reverse the examiner's rejection.

(c)(1)(viii) Claims appendix

The following are the claims involved with this appeal.

27. A container for use in coating a lollipop with a candy powder while preventing spillage of said candy powder, wherein said container includes an inner cavity and a funnel extending into said inner cavity, and wherein said container removably contains at least one of an edible particulate substance and a candy substance.

28. The container of claim 27 wherein said edible particulate substance further defines at least one of a candy powder substance and a candy bead substance, and wherein said candy substance further defines a lollipop.

29. The container of claim 27 wherein said container inhibits the spillage of said substance when said container is oriented in any position.

30. The container of claim 29 wherein said edible particulate substance further defines at least one of a candy powder substance and a candy bead substance, and wherein said candy substance further defines a lollipop and wherein said lollipop is removable from said container by passing said lollipop through said funnel.

31. The container of claim 27 wherein said candy substance defines a lollipop having a handle and wherein said handle includes a pliable holder mounted to said handle and wherein said holder is sealingly engagable to said container.

32. The container of claim 27 wherein said funnel includes an inner opening and wherein said inner opening is located substantially near the center of said container.

33. The container of claim 27 wherein at least a portion of said container is substantially transparent so as to reveal the contents of said container.

34. A container for use in coating a lollipop with a candy powder while preventing spillage of said candy powder, wherein said container includes an inner cavity and an open opening, and

wherein said container contains an edible particulate substance within said container, and wherein said container inhibits the spillage of said edible particulate substance when said container is oriented in any orientation.

35. The container of claim 34 wherein said container removably contains a candy substance.

36. The container of claim 34 wherein said open opening defines an open funnel.

37. The container of claim 36 wherein said edible particulate substance further defines at least one of a candy powder substance and a candy bead substance, and wherein said container further includes a lollipop removably contained at least partially within said container, and wherein said lollipop is removable from said container by passing said lollipop through said funnel.

38. The container of claim 37 wherein said lollipop includes a handle and wherein said handle includes a pliable holder mounted to said handle and wherein said holder is sealingly engagable to said container.

39. The container of claim 36 wherein said funnel includes an inner opening and wherein said inner opening is located substantially near the center of said container.

40. The container of claim 34 wherein at least a portion of said container is substantially transparent so as to reveal the contents of said container.

41. A container for use in coating a lollipop with a candy powder while preventing spillage of said candy powder, wherein said container includes an inner cavity and a funnel extending into said inner cavity, and a contents access utensil removably positioned in said container.

42. The container of claim 41 wherein said container inhibits the spillage of a flowable substance when said contents access utensil is removed from said container and said container contains a flowable substance and is oriented in any position orientation.

43. The container of claim 41 wherein said funnel includes an inner opening and wherein said inner opening is located substantially near the center of said container.

44. The container of claim 41 wherein at least a portion of said container is substantially transparent so as to reveal the contents of said container.

45. The container of claim 41 wherein said contents access utensil defines a lollipop.

46. The container of claim 42 wherein said flowable substance defines at least one of a candy powder substance and a candy bead substance.

(c)(1)(ix) Evidence appendix

Appellants have no evidence to present.

(c)(1)(x) Related proceedings appendix

Appellants are unaware of any proceedings to present.

Conclusion

In view of the above arguments, it is submitted that the examiner erred in rejecting the claims on appeal. Appellants therefore respectfully request that this honorable board reverse the examiner's rejection of the claims. If the board has any questions or comments which may be resolved over the telephone, the board is requested to call Michael R. Schramm at 801-710-7793.

DATE: September 4, 2012

Respectfully submitted,



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